IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. ALEXANDER ACOSTA, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	2:15-cv-1094
Plaintiff,	)	**ELECTRONICALLY FILED**
v.	)	
HOLLAND ACQUISITIONS, INC., d/b/a HOLLAND SERVICES, a Corporation; and BRYAN GAUDIN, Individually, and as a Corporate Officer of HOLLAND ACQUISITIONS, INC., d/b/a HOLLAND SERVICES,	)	
Defendants.	)	

MEMORANDUM ORDER

Pending before the Court is Defendants' Motion to Compel Production of Discovery. (ECF No. 112.) In it, Defendants argue that the Secretary of Labor has improperly invoked the "Informant's Privilege" to justify his refusal to produce the following: (1) unredacted interview statements and communications by the individuals listed on Schedule A to the Second Amended Complaint (Second Am. Compl., ECF No. 57); and (2) unredacted emails and documents provided by the individuals listed on Schedule A to the Second Amended Complaint ("Items (1) and (2)"). Defendants move to compel the Secretary to produce Items (1) and (2). (ECF No. 112.) For the reasons set forth below, Defendants' Motion to Compel, ECF No. 112, is DENIED WITHOUT PREJUDICE.

1. Defendants assert the Secretary did not properly invoke the Informant's Privilege. At the Court's direction, the Secretary filed his Brief in Support of Motion Hearing Describing the Delegation of Authority to the Deputy Administrator for Operations to Assert Privileges on Behalf of the Department of Labor. (ECF No. 121.) The Court ordered Defendants to

respond on or before August 31, 2017. (ECF No. 122.) Defendants failed to do so. As a result, the Court deems Defendants' improper invocation argument withdrawn.

2. The Court concludes that the sole act of naming an individual on Schedule A does not waive any Informant's Privilege that might apply to that individual. *See Mitchell v. Roma*, 265 F.2d 633, 637–38 (3d Cir. 1959) (stressing the importance of the "distinction . . . between telling an employer which employees were underpaid and who gave the information about underpayment").

3. Since the "scope of the [informant's] privilege is limited by its underlying purpose" and that purpose is the "furtherance and protection of the public interest in effective law enforcement," *Roviaro v. United States*, 353 U.S. 53, 59–60 (1957), the Court concludes that the Informant's Privilege is not destroyed merely because one's communication to the Government fails to reveal an actual violation of the law.

4. The Informant's Privilege is not absolute, but Defendants bear the burden to show that their need for the information sought in their Motion is essential to the fair determination of their case. *Roma*, 265 F.2d at 636; *Chao v. Raceway Petroleum, Inc.*, No. 06-3363, 2008 WL 2064354, at *3 (D.N.J. May 14, 2008). The Court concludes that Defendants have not met their burden at this time to compel Items (1) and (2). *See In re Perez*, 749 F.3d 849 (9th Cir. 2014) (concluding defendant failed to show that identifying information related to non-testifying informants was essential to its defense).

5. This Order shall not be construed to enable Plaintiff to avoid the disclosure of the identity of witnesses, or the contents of affidavits, statements, communications, or the like that Plaintiff may use at summary judgment or trial. *See Brock v. DialAmerica Mktg., Inc.*, No. 81-4020, 1986 WL 28913 (D.N.J. Oct. 15, 1986) (affirming a magistrate judge's order that a list of potential witnesses must be disclosed prior to trial and once a witness is disclosed, the

Informant's Privilege does not apply). If Plaintiff relies on any information or communication from any individual listed on Schedule A, either in support of a position taken by him in regard to a summary judgment motion or in support of its case at trial, Plaintiff will be deemed to waive the Informant's Privilege with respect to information or communication related to that individual, including prior statements. A date will be set falling at least ninety (90) days prior to the close of fact discovery (to be set by further Order of the Court) for the Plaintiff to make its designation of its trial/summary judgment witnesses, representative claimants, and/or exhibits in order to allow such disclosures.

Mark R. Hornak
United States District Judge

Dated: October 18, 2017

cc: All counsel of record